Talasco Insurance Bhd (formerly known as Talasco Insurance Sdn Bhd) v Shahabudin bin Abdul Rashid

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2(S7)–24–2467 OF 2000

KAMALANATHAN RATNAM J

18 APRIL 2001

Land Law *— Sale of land — Order for — Cause to the contrary — Demand for outstanding amount due on charge — Excess interest — Plaintiff-employer contracted under housing scheme to absorb excess interest above fixed rate for loan taken by defendant-employee — Defendant dismissed, effect on defendant's entitlement under scheme — Whether plaintiff could charge excess interest paid on behalf of defendant when defendant was still an employee*

The defendant was the former chief accountant of the plaintiff. The plaintiff offered to all its employees the benefit of a housing loan scheme which it had negotiated with the bank. By this scheme, the defendant was given a 100% loan for the purchase of a piece of land costing RM250,000 and interest was fixed at only 4%pa and payment was to be made by way of monthly salary deductions. The land was registered in the defendant's name and charged to Bank Kerjasama Rakyat Malaysia Bhd. Any additional interest over and above the set 4%pa was to be absorbed by the plaintiff. As further security, the plaintiff executed a guarantee wherein the plaintiff agreed to pay all monies due and owing by the defendant to the bank under the facility. Differences arose between the plaintiff and the defendant and the defendant claimed constructive dismissal. He sued the plaintiff for wrongful dismissal and the Industrial Court awarded the defendant RM221,450 as salary in lieu of reinstatement. However, the award was quashed by the High Court and the appeal by the defendant to the Court of Appeal had been heard and decision was pending. The plaintiff then applied to sell the land by public auction. The bank subsequently instituted legal proceedings against the plaintiff and obtained summary judgment against the plaintiff. The plaintiff paid the bank the full and final settlement of the defendant's outstanding loan. In 1997, the bank executed a transfer of charge over the land in favour of the plaintiff. Notice of the transfer of charge was given to the defendant by personal service of the plaintiff's letter. By a notice in writing, the plaintiff demanded payment of the whole outstanding balance on the said charge with interest. The plaintiff then sent the statutory notice of default and as there was no response, the plaintiff filed encl 1, the originating summons. On the date fixed for the hearing of encl 1, counsel for the plaintiff raised a preliminary objection. The objection related to two affidavits of the defendant, namely encl 6A and 6B, which were replies to the plaintiff's affidavit in support (encl 2) and the plaintiff's further affidavit giving details

pursuant to O 83 r 3(3) of the Rules of the High Court 1980 ('the RHC') (encl 3A). A

Held, dismissing the originating summons:

(1) The plaintiff pointed out that whilst encl 2 was served on the defendant on 28 September 2000, the reply (encl 6A) was only served on the plaintiff's solicitors on 6 December 2000. It was filed on 7 December 2000. Enclosure 6B which was in response to encl 3A was filed on 12 December 2000 and served on the plaintiff's solicitors on the same day. Enclosure 3A was filed on 2 November 2000. Clearly the defendant was out of time in respect of both the replies. When asked for her response to the application for an abridgement of time, counsel for the plaintiff indicated she was leaving this issue to the court. The court takes this to mean that the plaintiff had no objection to the request for an abridgement of time and in the exercise of the court's discretion given by O 3 r 5 of the RHC, the court granted an order to abridge the time for the service of the two affidavits to comply with O 28 r 3(4) of the RHC (see p 478C–F). B C D

(2) Assuming that the date of constructive dismissal was 6 February 1988, up to this date the defendant could only be charged interest at 4%pa pursuant to the housing loan scheme he had entered into. The demand notice of the plaintiff and the statutory notice under Form 16D did not show how the plaintiff had arrived at the sum claimed (see p 479D–E). E

(3) Another argument of the defendant which the court accepted was that, at worst, the plaintiff was only entitled to interest at 4% up to the date of the transfer of the charge from the bank to the plaintiff pursuant to s 218 of the National Land Code 1965 ('the NLC') and which said transfer was registered on 23 May 1997, because until this time any excess interest over and above the fixed rate of 4% was to be absorbed by the plaintiff (see p 479E–F). F G

(4) The court was satisfied that the defendant's case fell squarely within the third category of cases set out by the Federal Court (ie, when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity) in determining 'cause to the contrary' within s 256(3) of the NLC. Clearly it was inequitable for the plaintiff to charge interest in excess of 4% when the defendant was still its employee and the onus was on the plaintiff to show cause to the contrary. In this case, the plaintiff had failed to demonstrate this. On the other hand, calculations suggested that the plaintiff had indeed claimed interest in excess. Since the plaintiff, as admitted by its counsel, had a right to sue for recovery on the basis of indemnity, clearly the plaintiff was not without a remedy (see p 479H–I). H I

[Bahasa Malaysia summary

Defendan seorang bekas ketua akauntan kepada plaintif. Plaintif telah menawarkan kepada semua pekerjanya manfaat satu skima pinjaman perumahan yang beliau telah bincangkan dengan bank. Melalui skima ini, defendan telah diberikan satu pinjaman 100% untuk membeli sekeping tanah berjumlah RM250,000 dan faedahnya hanya pada kadar 4%pa dan bayaran sepatutnya dibuat melalui tolakan gaji bulanan. Tanah tersebut telah didaftarkan atas nama defendan dan dicagarkan kepada Bank Kerjasama Rakyat Malaysia Bhd. Apa-apa faedah tambahan yang melebihi 4%pa yang telah ditetapkan tersebut telah diserap oleh plaintif. Sebagai cagaran selanjutnya, plaintif telah menyempurnakan satu jaminan di mana plaintif telah bersetuju untuk membayar semua wang yang perlu dibayar dan terhutang oleh defendan kepada bank di bawah kemudahan tersebut. Perbezaan pendapat telah timbul antara plaintif dan defendan dan defendan telah menuntut pemecatan konstruktif. Beliau telah menyaman plaintif kerana pemecatan salah dan Mahkamah Perusahaan telah mengawardkan defendan RM221,450 sebagai gaji bagi menggantikan pengembalian kedudukan jawatan. Bagaimana-pun, award tersebut telah dibatalkan oleh Mahkamah Tinggi dan rayuan oleh defendan kepada Mahkamah Rayuan telah didengar dan sedang menunggu keputusan. Plaintif kemudiannya telah memohon untuk menjual tanah tersebut melalui lelongan awam. Bank selepas itu telah memulakan prosiding undang-undang terhadap plaintif. Plaintif telah membayar bank penyelesaian penuh dan terakhir kepada baki pinjaman defendan. Pada tahun 1997, bank telah menyenpurnakan satu pindahmilik cagaran ke atas tanah tersebut bagi pihak plaintif. Notis pindahmilik cagaran tersebut telah diberikan kepada defendan melalui penyampaian ke diri dalam surat plaintif. Melalui satu notis bertulis, plaintif telah memfailkan lampiran 1, iaitu saman pemula. Pada tarikh yang telah ditetapkan untuk perbicaraan lampiran 1, peguam bagi pihak plaintif telah menimbulkan satu bantahan awal. Bantahan tersebut berkaitan dengan dua afidavit defendan, iaitu lampiran 6A dan 6B, yang merupakan jawapan-jawapan kepada afidavit sokongan plaintif (lampiran 2) dan afidavit lanjutan plaintif yang memberikan butir-butir menurut A 83 k 3(3) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') (lampiran 3A).

Diputuskan, menolak saman pemula tersebut:

(1) Plaintif menegaskan tatkala lampiran 2 disampaikan ke atas defendan pada 28 September 2000, jawapan (lampiran 6A) hanya disampaikan ke atas peguamcara plaintif pada 6 Disember 2000. Ia telah difailkan pada 7 Disember 2000. Lampiran 6B yang merupakan jawapan kepada lampiran 3A telah difailkan pada 12 Disember 2000 dan disampaikan ke atas peguamcara plaintif pada hari yang sama. Lampiran 3A telah difailkan pada 2 November 2000. Adalah jelas defendan di luar had masa

berhubung kedua-dua jawapan tersebut. Apabila ditanya mengenai jawapan beliau tentang permohonan untuk satu perlanjutan masa, peguam bagi pihak plaintif menyatakan beliau menyerahkan persoalan ini kepada mahkamah. Mahkamah menganggap ini sebagai bermaksud bahawa plaintif tiada bantahan kepada permintaan satu perlanjutan masa dan dalam menggunakan budi bicara mahkamah yang diberikan oleh A 3 k 5 KMT, mahkamah membenarkan satu perintah untuk lanjutan masa bagi penyampaian kedua-dua afidavit tersebut untuk mematuhi A 28 k 3(4) KMT (lihat ms 478C–F).

(2) Dengan beranggapan bahawa tarikh pemecatan konstruktif tersebut adalah pada 6 Februari 1988, sehingga tarikh ini defendan hanya boleh dikenakan faedah 4%pa menurut skima pinjaman perumahan yang beliau telah masuki. Notis tuntutan plaintif dan notis statutori di bawah Borang 16D tidak menunjukkan bagaimana plaintif tiba kepada jumlah yang dituntut (lihat ms 479D–E).

(3) Satu lagi hujah defendan yang telah diterima oleh mahkamah adalah, paling terukpun, plaintif hanya berhak kepada faedah 4% sehingga tarikh pindahmilik cagaran daripada bank kepada plaintif menurut s 218 Kanun Tanah Negara 1965 ('KTN') dan di mana pindahmilik tersebut telah didaftarkan pada 23 Mei 1997, kerana sehingga kini apa-apa lebihan faedah melebihi kadar tetap 4% tersebut hendaklah diserap oleh plaintif (lihat ms 479E–F).

(4) Mahkamah berpuas hati bahawa kes defendan jatuh dalam lingkungan kes-kes kategori ketiga yang dinyatakan oleh Mahkamah Persekutuan (iaitu, apabila seorang penggadai mendemonstrasikan bahawa pemberian satu perintah jualan adalah bertentangan dengan undang-undang atau ekuiti) di dalam menentukan 'sebab sebaliknya' dalam maksud s 256(3) KTN. Adalah jelas adalah tidak ekuiti untuk plaintif mengenakan faedah melebihi 4% apabila defendan masih pekerjanya dan beban adalah atas plaintif untuk menunjukkan sebab sebaliknya. Di dalam kes ini, plaintif telah gagal untuk menunjukkan ini. Sebaliknya, pengiraan mencadangkan bahawa plaintif sememangnya telah menuntut faedah yang lebih. Memandangkan plaintif, sebagaimana yang diakui oleh peguamnya, mempunyai hak untuk menyaman untuk pengembalian semula berdasarkan indemniti, adalah jelas plaintif mempunyai remedi (lihat ms 479H–I).]

Notes

For cases on order for sale of land, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3582–3673.

Cases referred to

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77

Legislation referred to

National Land Code 1965 ss 256(3), 340, Form 16D
Rules of the High Court 1980 O 3 r 5, O 28 r 3(4), O 83 r 3(3)

S Susheila (*Shook Lin & Bok*) for the plaintiff.
R Thilakan (*Thilakan & Co*) for the defendant.

Kamalanathan Ratnam J:

Facts

This is the plaintiff's application for sale by public auction the land registered in the defendant's name and held under HS(D) 11309, No PT 395, Mukim Ampang, Daerah Kuala Lumpur ('the land') and charged to Bank Kerjasama Rakyat Malaysia Bhd ('the bank') for the purpose of securing, for the benefit of the bank, the sums due from time to time to the bank by the defendant amounting to RM257,291.65 advanced by the bank to the defendant with interest thereon at the rate of 1.5%pa above the bank's base lending rate, with yearly rests. As further security for the facility granted by the bank to the defendant, the plaintiff executed a guarantee dated 5 July 1985 wherein the plaintiff agreed to pay, on demand, all monies due and owing by the defendant to the bank under the said facility. The bank instituted legal proceedings against the plaintiff and obtained summary judgment against the plaintiff on 31 October 1989 and the plaintiff paid the bank on 15 February 1990 the total sum of RM319,573.58 (which included the bank's legal costs) as full and final settlement of the defendant's outstanding loan with the bank. However, the bank returned the legal costs of RM3,354 on 26 February 1990 to the plaintiff. On or about March 1997, the bank executed a transfer of charge over and in favour of the plaintiff and the same was presented and registered in the name of the plaintiff and notice of the said transfer of charge was given to the defendant by personal service of the plaintiff's letter dated 11 June 1997 to a person at the defendant's house on 17 June 1997. By a notice in writing dated 12 June 2000, the plaintiff demanded through its solicitors, within 14 days from the date thereof, payment of the whole outstanding balance on the said charge as at 31 May 2000 amounting to RM576,749.86 with interest on the sum of RM316,219.58 at the rate of 8%pa from 1 June 2000 till the date of full settlement. The plaintiff then sent the statutory notice of default in Form 16D of the National Land Code 1965 ('the NLC'). Since there was no response, the plaintiff filed this originating summons (encl 1).

Preliminary objection by the plaintiff

On the date fixed for the hearing of encl 1, counsel for the plaintiff indicated that she was raising a preliminary objection, having given prior notice of her intention to do so. The objection related to two affidavits of the defendant, namely, encl 6A and 6B which were replies to the plaintiff's affidavit in support (encl 2) and the plaintiff's further affidavit giving details pursuant to O 83 r 3(3) of the Rules of the High Court 1980 ('the RHC') (encl 3A). The complaint of the plaintiff was that the defendant had not complied with the amended O 28 r 3(4) of the RHC which reads as follows:

> Where the defendant intends to adduce evidence with reference to the originating summons served on him, he must also do so by affidavit and the affidavit must be filed and a copy thereof must be served on the plaintiff not later than 14 days after being served with a copy of the affidavit by the plaintiff under para (2).

The plaintiff pointed out that whilst encl 2 was served on the defendant on 28 September 2000, the reply (encl 6A) was only served on the plaintiff's solicitors on 6 December 2000. It was filed on 7 December 2000. Enclosure 6B which was in response to encl 3A was filed on 12 December 2000 and served on the plaintiff's solicitors on the same day. Enclosure 3A was filed on 2 November 2000. Clearly the defendant was out of time in respect of both the replies. However, the plaintiff prayed for an abridgement of time. When asked for her response to the application for an abridgement of time, Cik Susheila for the plaintiff indicated she was leaving this issue to the court. I took this to mean that the plaintiff had no objection to the request for an abridgement of time and in the exercise of my discretion given to me by O 3 r 5 of the RHC, I granted an order to abridge the time for the service of the two affidavits to comply with O 28 r 3(4) of the RHC.

Findings of the court

The plaintiff rested its case on the various affidavits and pursuant to encl 6C of the plaintiff's affidavit the sum claimed as of the date of hearing was RM596,301.29. The defendant pointed out that he was the former chief accountant of the plaintiff. By way of a circular letter dated 2 May 1986, the plaintiff offered to all its employees the benefit of a housing loan scheme which it had negotiated with the bank. By this scheme the defendant was given a 100% loan for the purchase of the and costing RM250,000 and interest was fixed at only 4%pa and payment was to be made by way of monthly salary deductions. Any additional interest over and above the set 4%pa was to be absorbed by the plaintiff.

In the meantime, unhappy differences arose between the plaintiff and the defendant and the defendant claimed constructive dismissal. He sued the plaintiff for wrongful dismissal and the Industrial Court awarded the defendant RM221,450 as salary in lieu of reinstatement. However, the said award was quashed by the High Court and the appeal by the defendant to

the Court of Appeal has been heard and he is now presently awaiting the said decision.

It was the submission of the defendant that if he succeeded in the appeal then he would be deemed to have been in the employment until the award was made, that is, on 17 November 1994, or up to the date when the decision of the Court of Appeal is pronounced, since he was given compensation of one month's salary for every year of completed service (that is, the period from 24 February 1974, the date of joining, to the last date of hearing of the dismissal) totalling 19 years. In the circumstances, he could not be charged any interest in excess of the 4%, whereas the calculation of the plaintiff to the date of this hearing included interest in excess of the fixed 4%.

Whilst this might be true if the defendant succeeded in his appeal before the Court of Appeal, what is the position if the defendant failed in his appeal? From the notes of proceedings in the Industrial Court I note that due to the various acts of the plaintiff, the defendant sent a letter to the plaintiff dated 30 January 1988 informing the plaintiff to restore him to his former position within seven days. As there was no response from the plaintiff, the defendant was compelled to claim that he had been dismissed constructively. Assuming therefore that the date of constructive dismissal was 6 February 1988, up to this date the defendant could only be charged interest at 4%pa pursuant to the housing loan scheme he had entered into. The demand notice of the plaintiff and the statutory notice under Form 16D do not show how the plaintiff had arrived at the sum claimed.

Another argument of the defendant which I accept is that, at worst, the plaintiff is only entitled to interest at 4% up to the date of the transfer of the charge from the bank to the plaintiff pursuant to s 218 of the NLC and which said transfer was registered on 23 May 1997, because until this time any excess interest over and above the fixed rate of 4% was to be absorbed by the plaintiff.

In *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77, the Federal Court ruled that 'cause to the contrary' within s 256(3) of the NLC might be established only in three categories of cases: (i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s 340 of the NLC; (ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and (iii) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity. I am satisfied that the defendant's case herein falls squarely within the third category of cases set out by the Federal Court. Clearly it is inequitable for the plaintiff to charge interest in excess of 4% when the defendant was still its employee and the onus is on the plaintiff to show that it did just that. In this case, the plaintiff has failed to demonstrate this. On the other hand, calculations suggest that the plaintiff had indeed claimed interest in excess. Since the plaintiff, as admitted by its counsel, has a right to sue for recovery on the basis of indemnity, clearly the plaintiff is not without a remedy. But

as for attempting foreclosure proceedings, I am satisfied that the defendant has shown sufficient cause to the contrary. I therefore dismissed encl 1 with costs.

Application dismissed.

Reported by Wong Ee Lynn